Royal Canadian Mounted Police
External Review Committee

2013-14

Annual Report

Canada

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Comité externe d'examen
de la Gendarmerie royale du Canada

June 6, 2014

The Honourable Steven Blaney, P.C., M.P.
Minister of Public Safety and Emergency Preparedness
269 Laurier Avenue West
Ottawa, Ontario
K1A 0P8

Dear Minister:

In accordance with Section 30 of the Royal Canadian Mounted Police Act, I am pleased to submit to you the annual report of the RCMP External Review Committee for fiscal year 2013-14, so that it may be tabled in the House of Commons and in the Senate.

Yours very truly,

David Paradiso
Interim Chair

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PART I: Message from the Interim Chair

I am honoured to have been appointed interim Chair of the RCMP External Review Committee by the Governor General in Council during this past year. My years as the Executive Director and Senior Counsel prepared me only partly for the complexities of the Chair's duties. However during this year, certain of the impressions that I had developed beforehand were confirmed. Most strikingly, I found that those who are not routinely involved in employment grievances or discipline appeals tend to misconstrue the critical role performed by administrative tribunals like the ERC. To best explain it, I offer the following analogy.

Consider the law as a science like physics. Tribunal counsel are technical experts in their discipline, just as physicists and engineers are experts in theirs. Decision writers are to the law, what architects are to engineering. As architects make use of new materials and new processes to build from fundamental elements, tribunals apply new case law and regulations to ancient principles. In their respective spheres, decision writers and architects alike create solutions to modern day challenges. A decision or recommendation can be equated with a bridge, a building, or a machine. The best are lasting things of beauty. We build on the wisdom and on the lessons of our forbears. Hammurabi is our Archimedes; Lord Denning our da Vinci; and Louise Arbour our Frank Lloyd Wright.

The ERC conducts a specialized and highly technical review of the cases referred to it. The ERC does not represent the interests of either the RCMP management or the RCMP members. Its reviews are objective, impartial and fair. Canadians want to know that the Force is a principled public institution governed by rules that reflect contemporary society. The ERC's reputation for integrity lends credibility and legitimacy to the RCMP's internal processes.

I am indebted to the former Chair, Catherine Ebbs, who set the highest standard of fair scrutiny and compassionate professionalism and who left a legacy of respect for individuals that pervades the culture of the ERC. I am also indebted to the excellent staff of the ERC who, with precision and accuracy, ensure that the Chair's role can be executed faithfully.

David Paradiso
Interim Chair

Message from the Former Chair

I was ERC Chair for eight years, from April 2005 to July 2013. It was an amazing journey, and I was privileged to work with a group of incredibly knowledgeable and dedicated public servants.

The ERC carries out a very specialized mandate - to ensure that RCMP labour relations matters are dealt with fairly and openly, and in accordance with legal principles. It is an extremely important task. It is about how the RCMP treats its members, and how the members protect the trust we place in them to be there when we need them to keep Canadians safe. Among other things, it is about seeing that a harassment complaint is handled properly, that a dismissal for misconduct is justified, and that a finding about a breach of the RCMP *Code of Conduct* is supported by the evidence.

Why does this all make a difference? Because we all know that for any workplace to run effectively, the employer-employee relationship has to be open, honest and fair. We need the RCMP to run effectively. And that is why we need the RCMP External Review Committee.

Because of the many changes that are imminent regarding how the RCMP manages its members, the ERC's role has become more important than ever. Whatever these upcoming modifications bring, I have no doubt that the talented ERC team will be up to the task.

Catherine Ebbs

Catherine Ebbs
Former Chair

PART II: Who We Are and What We Do

In 1976, *The Commission of Inquiry Relating to Public Complaints, Internal Discipline and Grievance Procedure Within the Royal Canadian Mounted Police* recommended that there be independent review of RCMP labour relations matters. This would ensure that RCMP labour relations systems were as fair and equitable as possible, and perceived to be so by members of the Force. It also concluded that independent reviews were vital to a system *"which would have the respect of those members most likely to have an occasion to resort to it"*.

The RCMP External Review Committee (ERC) is the independent federal tribunal established by Parliament over twenty years ago to carry out the independent reviews recommended by the 1976 Commission of Inquiry.

The ERC reviews certain types of grievances, as well as disciplinary appeals, and discharge and demotion appeals. Its jurisdiction is restricted to regular and civilian members only. Public servants employed by the RCMP have separate labour relations processes.

As a quasi-judicial tribunal, the ERC applies the rule of law, and its role is crucial to ensuring transparency, fairness, and impartiality in RCMP labour relations processes. Once the ERC reviews a case, it issues findings and recommendations to the Commissioner of the RCMP who then makes the final decision.

The ERC helps to maintain fair and equitable labour relations within the RCMP. Over the years, its findings and recommendations have prompted the RCMP to make policy changes in many areas of its internal labour relations, including medical discharges, suspensions without pay, harassment prevention, relocation and transfer allowances, and workforce adjustment.

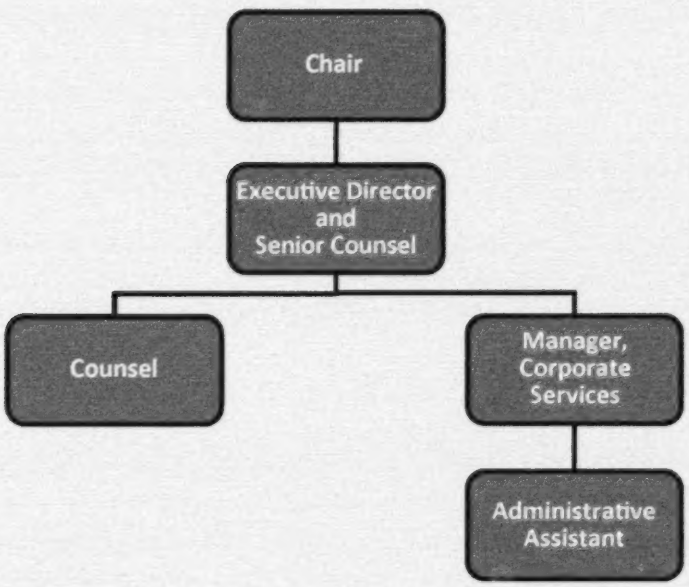
As one of two bodies which oversee the RCMP (the other being the Commission for Public Complaints Against the RCMP), the ERC has an important function in maintaining public confidence in the RCMP by helping to ensure that the RCMP respects the law and human rights in labour relations.

In 2013-14, the ERC's budget was approximately $1.6 million, and it began the year with a staff of eight, including the former Chair. Following the end of the former Chair's term on July 31, 2013, the Executive Director/Senior Counsel was appointed as Interim Chair. The interim nature of this appointment affected the ERC's Human Resources planning for the balance of 2013-14.

The ERC spent approximately 90% of its time and resources on case review, and 10% on outreach and communication. Corporate services such as financial management, human resources and information technology services are included in these two sets of activities.

Organizational Structure

The ERC reports to Parliament through the Minister of Public Safety and Emergency Preparedness. It is headed by a Chair who is appointed by order of the Governor in Council. The Chair



is also the Chief Executive Officer. Under the *Royal Canadian Mounted Police Act* (*RCMP Act*)[1], no one who is appointed to the ERC can be a member of the RCMP.

In addition to the Chair, the ERC is managed by an Executive Director/ Senior Counsel who oversees a staff of six. The staff is comprised of lawyers who are experts in labour, employment and administrative law. It also includes a small number of administrative personnel who ensure the day-to-day operations of a modern public institution.

The ERC receives some support services from Public Safety Canada through a Memorandum of Understanding for assistance in such areas as Human Resources, Information Technology, and Finance. As for all federal public service departments, the department of Public Works and Government Services Canada provides the ERC with all accommodation services.

Case Review Process

The ERC does not have authority to initiate reviews. The case review process starts when the Commissioner of the RCMP refers a case to the ERC. The types of cases that must be referred to the ERC are described in the *RCMP Act*. They include certain categories of grievances that are outlined in the *RCMP Regulations*, as well as all disciplinary appeals, and all discharge and demotion appeals.

When the ERC reviews a case, it examines the entire record, including all supporting documentation, the decision made, and the submissions of the parties. Where the review involves the appeal of a disciplinary decision, or a discharge and demotion decision, the transcript of the hearing, as well as any exhibits entered at the hearing, are also before the ERC. The ERC Chair may request that one or both parties provide additional information or submissions. If information is received from a party, the other party is given the chance to respond. The Chair also has the authority to hold a hearing if deemed necessary,

[1] Please note: On June 19, 2013, the *Enhancing Royal Canadian Mounted Police Accountability Act* S.C. 2013, c. 18 received Royal Assent. At the time of printing, this new legislation was not yet in force. Some processes referred to in this Annual Report may change once the new legislation comes into force.

The five types of grievances which must be referred to the ERC for review, as per section 36 of the *RCMP Regulations*:

(a) the Force's interpretation and application of government policies that apply to government departments and that have been made to apply to members;

(b) the stoppage of the pay and allowances of members made pursuant to subsection 22(3) of the *Act*;

(c) the Force's interpretation and application of the *Isolated Posts Directive*;

(d) the Force's interpretation and application of the *RCMP Relocation Directive*; and

(e) administrative discharge for reasons of physical or mental disability, abandonment of post, or irregular appointment.

although this option is rarely exercised. The Chair considers all of the evidence, legal issues, relevant legislation, and case law before making findings and recommendations.

The ERC Chair provides the findings and recommendations to the Commissioner of the RCMP and the parties involved. The Commissioner is the final decision-maker, and must consider the ERC's recommendations. If the Commissioner does not follow the ERC's recommendations, the *RCMP Act* requires that the Commissioner's decision include the reasons for not doing so.

The grievance, discipline, and discharge and demotion processes, and the ERC's role in each, are examined more closely below.

Grievance Process

The *RCMP Act* provides that disputes involving personal rights and interests are to be resolved through the RCMP grievance process. Grievances can cover a broad range of rights and interests, from entitlements to claim reimbursement for certain

expenses, to the right to work in an environment free from harassment and discrimination. Grievances represent the greatest number of cases referred to the ERC.

An RCMP officer designated as a Level I Adjudicator initially considers and decides a grievance. If the grieving member is dissatisfied with the Level I Adjudicator's decision, the member may file a Level II grievance which is decided by the Commissioner of the RCMP or designate. Under section 36 of the *RCMP Regulations*, before making a decision, the Commissioner must first refer to the ERC for its review, grievances which fall under five specified categories, unless the Commissioner grants a member's rare request to not do so.

Disciplinary Appeals Process

When an RCMP member is alleged to have committed a serious violation of the RCMP *Code of Conduct*, and formal discipline is initiated, an internal hearing is held to determine whether or not the allegations are established, and if so, what the appropriate sanction will be. The matter is heard by an Adjudication Board consisting of three senior RCMP officers. If, after the Board renders its decision, either the Force or the member wishes to appeal that decision to the Commissioner of the RCMP, then the Appellant and the Respondent provide written submissions to the Commissioner. Unless the Commissioner grants a member's rare request to not do so, the Commissioner refers the file to the ERC for its review. Once the ERC has conducted a thorough review of the file, it issues its findings and recommendations to the Commissioner and the parties involved.

Discharge and Demotion Appeals Process

A discharge or a demotion proceeding may be initiated against a member for failing to perform his/her duties in a satisfactory manner. When this happens, the member may request that a Discharge and Demotion Board, consisting of three senior officers of the RCMP, be convened to review the matter. The decision of the Board may be appealed by either the member or the Appropriate Officer who initiated the proceeding.

Appeal submissions are made in writing to the Commissioner of the RCMP. Unless the Commissioner grants a member's rare request to

ERC article topics include:

- **Referability:** A discussion concerning the Committee's jurisdiction to review matters
- **Standing:** Standing 101
- **Standing:** Subsection 31(1) of the *RCMP Act*: the "Standing" Requirement
- **Time Limits:** Statutory Time Limits
- **What Makes a Good Grievance?**

Other papers are listed on the ERC's website at www.erc-cee.gc.ca

not do so, the Commissioner refers all discharge and demotion appeals to the ERC for its review. Once the ERC has conducted a thorough review of the file, it issues its findings and recommendations to the Commissioner and the parties involved.

Outreach and Communication

In addition to case reviews, the ERC engages in other activities that support and enhance its core mandate. Outreach and communication, in a variety of forms, is an important component of its work.

The ERC publishes the quarterly *Communiqué*, which includes case summaries and articles on issues that commonly arise in cases.

The ERC also maintains a website (www.erc-cee.gc.ca) which contains, among other things, Annual Reports, its quarterly newsletter *Communiqué*, an extensive searchable database of summaries of the ERC's findings and recommendations, summaries of the Commissioner of the RCMP's subsequent decisions, and the ERC's most requested articles, discussion papers and specialized reports. The ERC has received positive feedback from its website users about its accessibility and utility.

When it can, the ERC provides information and training to various labour relations personnel within the RCMP. Outreach initiatives

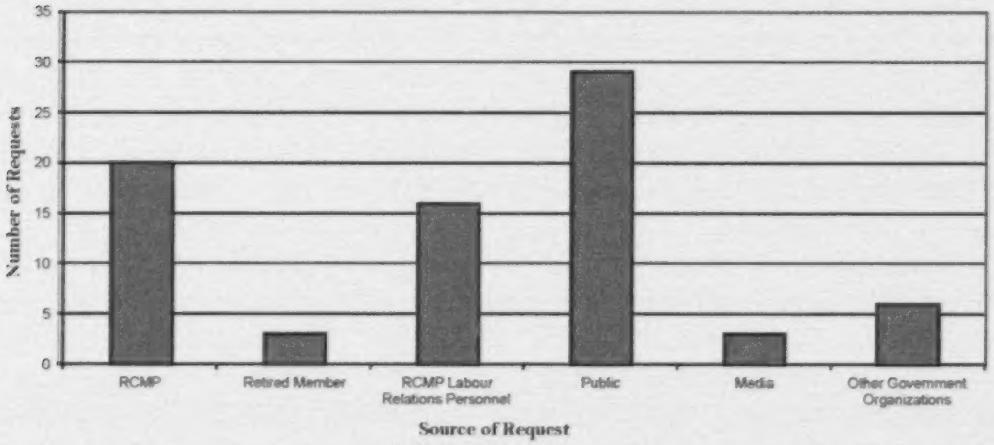
have included visits with RCMP members in National Headquarters, Divisional Headquarters, and detachments. The ERC tries to combine these visits with other travel whenever possible. During these information and training sessions, the ERC routinely addresses procedural difficulties or questions which commonly arise in grievance and appeal matters. This helps to encourage a better understanding of the importance and practical function of adhering to proper procedures. The ERC was able to deliver only one such initiative this year.

Requests for Information

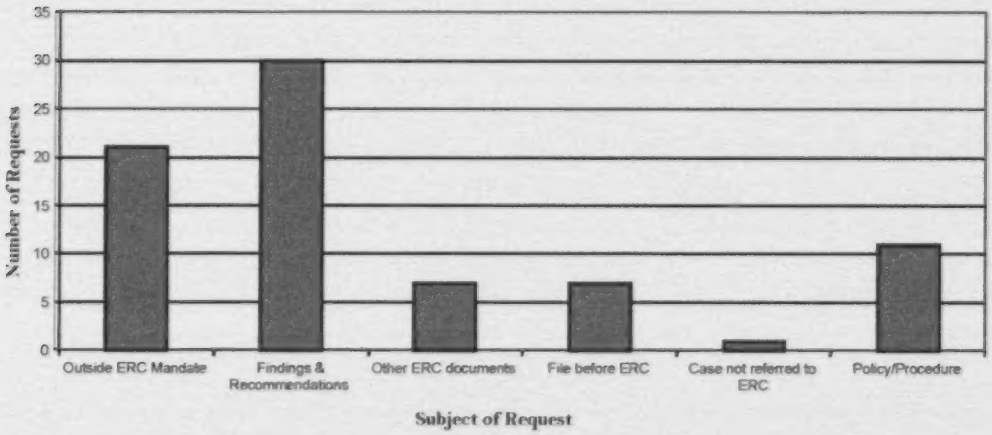
The ERC also responds to formal and informal requests for information. In 2013-14, the ERC received a total of 77 requests. On average, the ERC provided an answer to each request within one day. Just over half of the requests came from the RCMP itself. Members of the public were the second largest group of requesters.

The graphs below illustrate the general categories of requests received and their sources. Several requests were straightforward and requesters were provided with a timely response or were re-directed to the appropriate office. However, other requests were complicated and required more time and effort for a complete and accurate response. By far, the median response time was less than one day, indicating that a smaller number of complex inquiries were significantly time-consuming.

Requests for Information by Source



Requests for Information by Subject

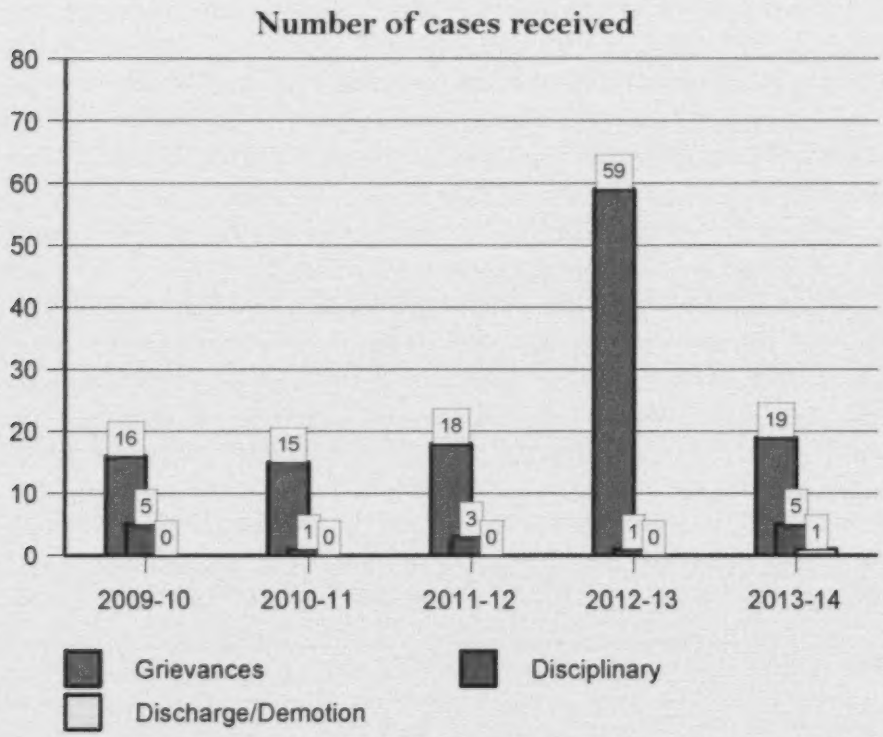


PART III: What We Did This Year

Case Review

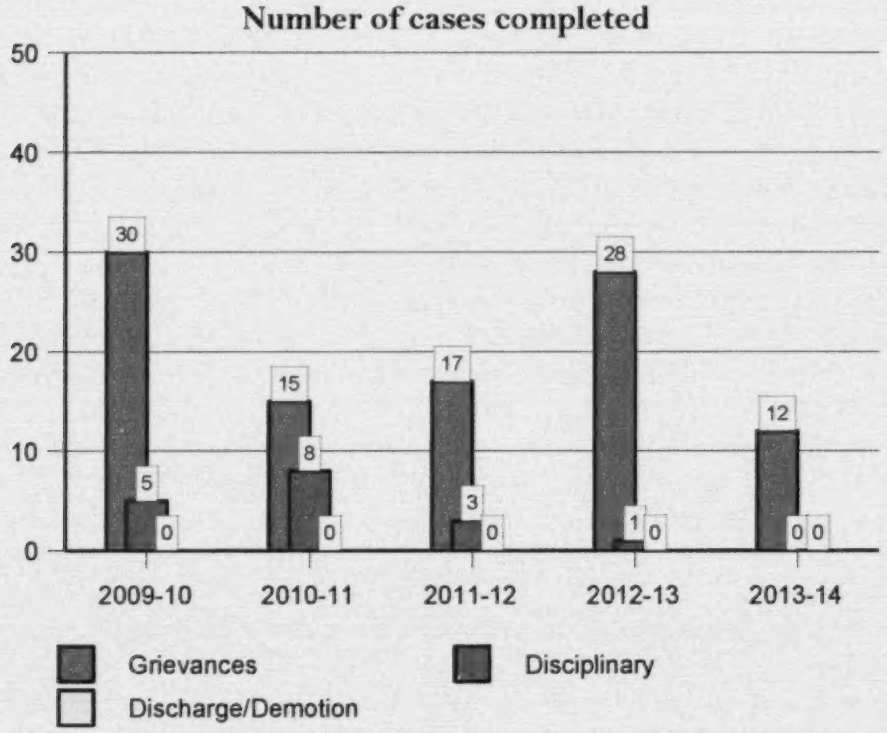
Referrals

Twenty-five case files were referred to the ERC in 2013-14: 19 grievances, five disciplinary appeals and one referral of discharge and demotion appeal.



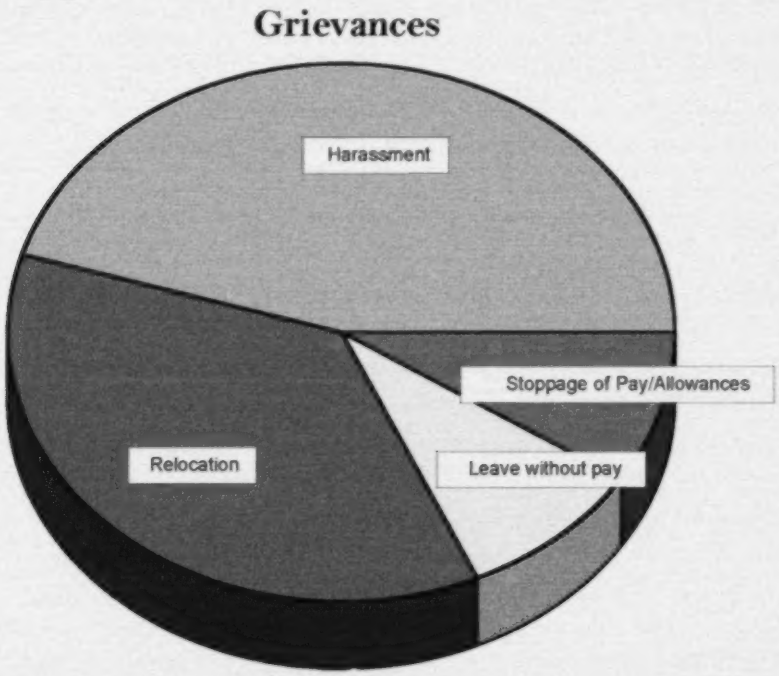
Cases Completed and Recommendations Issued

The ERC completed 12 cases in 2013-14: 11 findings and recommendations were issued regarding grievances. One case was withdrawn before the ERC could issue its findings and recommendations. The ERC did not issue any findings and recommendations in disciplinary, or discharge and demotion cases this year.



Grievance Reviews

The chart below shows the distribution of this year's grievance recommendations by subject matter.



In the last few years, travel, harassment and relocation issues accounted for a significant portion of grievance reviews. In 2013-14, harassment and relocation issues were still prominent.

Processing

At the start of 2013-14, 78 grievances and appeals were pending before the ERC. At the fiscal year end of 2013-14, there were 91 cases before the ERC for review. They were distributed as follows:

- 80 pending grievances;
- 10 pending disciplinary appeals; and
- 1 pending discharge and demotion appeal.

The RCMP is to develop new processes to implement the *Enhancing Royal Canadian Mounted Police Accountability Act* S.C. 2013, c. 18, modernizing discipline, grievance and human resource management frameworks for its members. Once these processes are established, the ERC will review them against its own procedures and make the necessary provisions allowing it to manage simultaneously the cases arriving under the authority of the amended legislation when it comes into force, as well as those cases referred under the *RCMP Act* in its present form. The ERC will then develop performance standards with respect to these cases, as they are required under the new legislation.

Other Activities

In addition to its case review function, the ERC must meet every statutory obligation required of all departments in the Public Service. The ERC is fully committed to delivering on its mandate, while ensuring compliance with legislation and policy.

The ERC's workload includes disproportionately significant reporting and corporate requirements. The ERC has few staff members who are involved in the collection, analysis and reporting of its corporate data to the central agencies that oversee the various aspects of management. As a result, these staff members are called upon to become the ERC's subject matter experts for a number of different areas including procurement, finance, human resources and knowledge management. These staff members assume many roles to address corporate management demands in order to meet the same reporting requirements of large departments and agencies. The ERC also uses a variety of external consultants to ensure that it thoroughly meets all of its obligations. Given the ERC's small size and budget, these reporting pressures take combined human and financial resources away from the case review process.

PART IV: Highlights of This Year's Cases

As a quasi-judicial tribunal, when reviewing grievances, disciplinary appeals, and discharge and demotion appeals, the ERC applies the rule of law and is guided by the principles of fairness, impartiality, independence, and transparency. The ERC is a recommending body. It issues findings and recommendations the same way that an adjudication body issues decisions.

The following sections highlight some of the significant matters the ERC addressed this year.

Grievances

Under Part III of the *RCMP Act*, a member may present a grievance if he or she is aggrieved by a decision, act, or omission that is made in the administration of the Force's affairs. The ERC reviews certain categories of grievances if a grievor seeks a review of a Level I decision. In so doing, it considers preliminary issues such as adherence to time limits, standing to grieve, information sharing, and admissibility of evidence. It also examines the merits of a grievance.

This year, the ERC considered several issues including time limit extensions, leave without pay requests, stoppage of pay and allowances orders, and various harassment-related matters.

Time Limits and Time Limit Extensions

Paragraph 31(2) of the *RCMP Act* provides that a member personally affected by an RCMP decision, act or omission has 30 days from the date of becoming aware of the decision, act or omission to present a grievance. This limitation period is mandatory. However, subsection 47.4(1) of the *RCMP Act* enables the Commissioner of the RCMP to extend, or to retroactively extend, the 30-day time limit if he or she is satisfied that circumstances justify such an extension. The Commissioner has delegated this authority to RCMP grievance adjudicators.

The decision about whether to grant a time limit extension is based on the specific context of each individual case. To assess the issue, the ERC considers the four-part test discussed by the Federal Court of Canada in *Canada (Attorney General) v. Pentney*, 2008 FC 96. Namely: was there a continuing intention to

pursue the matter; does the matter disclose an arguable case; is there a reasonable explanation for the delay; and is there prejudice to the opposite party? The test is meant to be adaptable and contextual. Moreover, all four factors need not be present, and other relevant factors may also be considered.

This year, the ERC looked at the time limit extension question in two cases, and made different recommendations in each.

In **G-559**, the RCMP refused the Grievor's request to pay for shipping his household effects to another location instead of storing them when he moved to an isolated post. Approximately five months after first learning about the refusal, he presented a grievance. The Grievor explained that he was unaware of the time limit requirement. He also contended that the subject of his grievance should be addressed because it was of importance to all members.

The Level I Adjudicator found that the grievance could not be considered because it was out of time. She did not address the question of a time limit extension.

The ERC recommended that the Commissioner decline to grant an extension. In applying the *Penney* test, it found that the Grievor had an arguable case, and that it was not clear that an extension would cause prejudice to the Respondent. However, it concluded that an extension was not warranted because the Grievor failed to show that he had a continuing intention to grieve during the months before he presented his grievance, and because his explanation for the delay was unreasonable. The ERC accepted that an extension may be justified where it would permit the Force to address certain issues that were broadly important Force-wide. However, it found that the Grievor's case involved a situational issue with narrow implications.

The Commissioner agreed with the ERC and denied the grievance.

In **G-560**, a Grievor disputed the RCMP's refusal to let her see certain documents related to the investigation of a harassment complaint she had made. The Grievor chose to grieve the refusal and presented her grievance to a member in the Professional Standards Unit, within the 30-day limitation period. However, the member who received her grievance did not forward it to the

proper authority until after the 30-day time limit had expired. The Level I Adjudicator ruled that the mandatory time limit had not been respected and that nothing justified an extension.

The ERC recommended that the Commissioner allow the grievance and grant an extension, for several reasons. Specifically, by handing her grievance to another member within the 30-day time limit, the Grievor revealed an intention to pursue the matter. The Grievor also reasonably expected that the other member would forward the grievance to the proper authority in time. She further had an arguable case in the sense that there was a reasonable chance of success. Lastly, the extension caused no prejudice to the Respondent.

The ERC emphasized the principle from *Pentney* that while time limits serve the important purpose of bringing finality to administrative decisions, it is clear that the discretion to allow extensions in certain situations is essential *"to ensure that justice is done between the parties"*.

Leave Without Pay

Leave without pay (LWOP) may be granted to RCMP members for various reasons, such as for educational or personal purposes. A decision to grant a member LWOP is discretionary, and is to be made by the commanding officer who evaluates the circumstances, in accordance with applicable policy. Previously, the ERC has recognized that where discretion is in play, some deference is required, unless the exercise of it is tainted by a lack of fairness.

In **G-555**, the ERC addressed the process that was followed to deny an LWOP request. The Grievor had received his previous supervisor's support for an LWOP to attend a United Nations mission abroad. One week prior to departure, a new supervisor was transferred in, so the Grievor submitted an LWOP request to him. The new supervisor denied the request on the basis of operational requirements, and later described the decision as final.

The Grievor requested clarification of that rationale, as he had been told he was not required to complete certain work. He then tried to meet with his commanding officer (the Respondent) to discuss the denied request. A few days prior to the Grievor's planned departure, he was told that his request would be forwarded to the Human Resources Officer *"for further action"*. He was unable to obtain clarification

from his immediate supervisor, or communicate with the Respondent. He ultimately retired from the Force in order to participate in the UN mission.

The Grievor filed a grievance in which he contested the denial of his LWOP request. The Level I Adjudicator denied the grievance. He found that the immediate supervisor's decision was solely a recommendation, since only the Respondent had the authority to grant or deny LWOP. He further found that operational requirements prevailed over the Grievor's personal interests.

The ERC recommended that the Commissioner allow the grievance. It found that the process followed in refusing the Grievor's request was not transparent. It explained that the Grievor could reasonably have expected his request to be treated according to RCMP leave policy. It also found that the immediate supervisor created confusion by indicating that his decision was final, which was at odds with policy, as only the Respondent had authority to make the decision.

The ERC further found that, although an LWOP decision is subject to discretion, the superiors who dealt with the Grievor's request should have given the Grievor more information about its status, instead of leaving questions unanswered. Lastly, the ERC found that the operational requirements rationale appeared contradictory, and that the process through which that rationale was considered and communicated seemed to lack transparency.

As the Grievor had retired from the Force, the ERC recommended that the Commissioner allow the grievance and apologize to the Grievor for the manner in which his request was handled. It further recommended that the LWOP policy be reviewed in order to make the process clearer.

Stoppage of Pay and Allowances Orders and PTSD Evidence

The *RCMP Stoppage of Pay and Allowances Regulations* state that when a member has been suspended from duty, a Stoppage of Pay and Allowances Order (SPAO) may also be imposed. According to RCMP policy and ERC jurisprudence, an SPAO is justified as an interim measure in extreme situations where it would be inappropriate to pay a member. One such situation is where a member is clearly involved in the commission of an offence that

is so outrageous as to significantly affect the proper performance of that member's duties.

This year, the ERC considered a grievance concerning the soundness of imposing an SPAO in the face of evidence linking a member's misconduct to Post Traumatic Stress Disorder (PTSD).

G-556 involved a Grievor who was caught, and admitted to, stealing loose change from a peer within a police office. Shortly thereafter, the Grievor began visiting Dr. H., a psychologist. Dr. H. diagnosed the Grievor with PTSD, a condition he attributed to the Grievor's experience at a gruesome suicide scene earlier in the year. He also opined that the Grievor's transgressions were *"symptomatic"* of PTSD. Subsequently, Dr. M., a Force psychologist who had never examined or met the Grievor, prepared a report in which she questioned Dr. H.'s conclusions.

The Respondent later issued an SPAO against the Grievor. He conceded that the Grievor had PTSD. However, he did not feel the Grievor's PTSD and thefts were linked, partly in light of Dr. M.'s report. The Grievor filed a grievance. He urged that the Respondent did not attach proper weight to Dr. H.'s evidence. The Level I Adjudicator disagreed, and denied the grievance.

The ERC found the Respondent's issuance of the SPAO to be legally unsound. In its view, the Respondent should not have devalued Dr. H.'s evidence of a connection between the Grievor's actions and PTSD without good reason, and in favour of speculation. It added that once the Force learned about the Grievor's PTSD, it had a legal obligation to find out if his actions were linked to it. By basing the SPAO, at least in part, on the unsupported report of a psychologist who had never examined or met the Grievor, the Force deprived itself of information vital to an analysis of whether the Grievor had engaged in *"outrageous"* behaviour justifying an SPAO.

The ERC accepted that stealing within a police office is reprehensible. However, in light of all the evidence, it found that the Grievor's misconduct was connected to his PTSD. His behaviour therefore could not reasonably be viewed as *"outrageous"*. The ERC in turn concluded that the SPAO was not justified. It recommended that the Commissioner allow the grievance, overturn the SPAO, and reinstate the Grievor's pay and

allowances retroactive to the date of the SPAO.

Harassment Complaints - Abuse of Authority

This year, the ERC reviewed four harassment grievances, all of which dealt with the question of what may or may not constitute an abuse of authority, which is a type of harassment. Generally speaking, an abuse of authority will occur where one improperly uses the power and authority in one's position to interfere with an employee's career or livelihood.

In **G-552 to G-554**, the Grievor was the subject of a co-worker's harassment complaint. Three superior officers met to decide how to handle the situation, and reassigned the Complainant's and Grievor's duties. The complaint against the Grievor was eventually dismissed. However, the Grievor believed that the officers had harassed him by prematurely deciding in favour of the Complainant, reassigning some of his duties to the Complainant, interfering with the complaint process and his career, humiliating him, and treating him in an offensive and demeaning way.

The Grievor presented separate harassment complaints against each of the three officers. He alleged that their actions constituted an abuse of authority. A Human Resources Officer (HRO) screened out each of the Grievor's complaints on the basis that none of the alleged conduct fell within the definition of "*harassment*". The Grievor grieved the HRO's decisions. The Level I Adjudicator denied the grievances.

The ERC recommended that the Commissioner allow the grievances. It found that the Grievor's allegations could meet the definition of "*harassment*", especially given that the Grievor was alleging an abuse of authority. It noted that an abuse of authority can be comprised of a series of ostensibly legitimate administrative decisions. It found that further clarification of the facts was required, that it was possible a full investigation could have led to a finding that an abuse of authority occurred, and that the complaints should not have been screened out.

In **G-558**, the Grievor, an acting supervisor, took a 12-day leave to deal with personal issues. During the leave period, her superior (the Respondent) held an impromptu meeting with other supervisors to discuss staffing, in accordance with a superior's order. When the

Grievor raised concerns that the meeting was held in her absence, the Respondent held another meeting the next day to facilitate the Grievor's attendance and input. The Grievor attended, but allegedly said and did questionable things which worried the Respondent and the other supervisors.

After the leave period, the Respondent met with the Grievor to discuss performance issues, as well as the communication of the group's staffing decisions. The Grievor described the staffing decisions in pejorative terms, and refused to message them positively. The Respondent soon lost faith in the Grievor's supervisory abilities, removed her from the acting supervisor position, and tried to place her in a role where she could receive mentoring.

The Grievor filed a grievance alleging that the Respondent committed an abuse of authority by removing her from the position, deliberately humiliating her in front of coworkers, manufacturing criticisms, tarnishing her professional reputation, and interfering with her opportunity to participate in an upcoming job competition. The Level I Adjudicator denied the grievance.

The ERC recommended that the Commissioner deny the grievance. It found that the Grievor did not demonstrate, on a balance of probabilities, that the Respondent had abused her authority or otherwise harassed the Grievor. The ERC found that holding a meeting without the Grievor was neither harassment nor inappropriate in the circumstances, and that it could be equally viewed as a proper good faith management decision made in the office's best interest. The ERC also found that the performance discussions did not amount to an abuse of authority, given that they were legitimate, necessary, professional, and not carried out in a way that was contrary to harassment policies. Lastly, there was no evidence of harm to the Grievor's career.

Harassment Complaints - Screening Process

The ERC found errors at the screening stage of the harassment complaint process, in three of the four harassment grievances it considered this year.

In **G-552 to G-554** (see above), the Grievor challenged the fairness of a harassment complaint screening process. The ERC found that three

key errors had been made in that process.

First, the ERC noted that, according to applicable harassment policy, the Respondent HRO did not have the authority to screen out the complaints. It explained only the Responsible Officer (RO) had that authority. As a result, it stressed that if the Respondent believed the allegations did not meet the definition of "*harassment*", he was required to direct the complaint to the RO for a final decision.

Second, the ERC found that the screening process was unfair because the Respondent was in a conflict of interest that created a perception of bias. The Respondent had stated that the alleged harassers acted with his full awareness. The ERC stressed that one cannot be both a witness and a decision-maker in the same process without raising a reasonable apprehension of bias. Therefore, the Respondent should not have been screening the harassment complaints. The ERC stressed that impartiality and fairness are cornerstones of a harassment investigation, and that these principles also apply to the screening of harassment complaints.

Third, the ERC found that the Respondent failed to satisfy two important procedural requirements. He did not seek clarification from the Grievor before determining that the allegations fell outside the definition of "*harassment*". He also did not apply the correct harassment complaint screening test, which is: *assuming the allegations are true, do they fall within the definition of "harassment"?* Accordingly, he effectively by-passed the screening stage.

Related Federal Court Decisions

The ERC monitors judicial proceedings related to cases it has reviewed. The Federal Court of Canada recently issued three decisions involving two disciplinary appeals which had been before the ERC and the Commissioner. In both cases, it agreed with the ERC's recommendations, and set aside the Commissioner's original decision to terminate the member's employment.

Elhatton v Canada (Attorney General)

In **D-108**, the member faced one count of disobeying a lawful order, and five counts of disgraceful conduct. The Adjudication Board found that all six allegations had been established, and imposed

a global sanction directing the Member to resign within 14 days, or be dismissed. The member appealed the Board's findings for three of the disgraceful conduct allegations, each of which involved his ex-wife as the complainant; and for the allegation of disobeying a lawful order. He also appealed the sanction. After the matter was referred to the ERC, the Member forwarded new information indicating that an independent investigator had substantiated his allegations that his ex-wife and her fiancé had lied under oath at his disciplinary hearing.

For the allegation of disobeying a lawful order, the ERC recommended, and the Acting Commissioner agreed, that the appeal be allowed because the order had been unlawful.

For the remaining allegations involving the Member's ex-wife, the ERC noted that credibility was the only substantive issue. It found that the evidence that she had lied under oath could have changed the Board's assessment of credibility, and could have led the Board to find that the allegations were unproven. The ERC recommended that the Commissioner allow the appeal, and order a new hearing into the three allegations before a differently constituted Board. The ERC recommended a sanction of a reprimand and a forfeiture of 3 days' pay for each of the two allegations that had not been appealed.

The Acting Commissioner admitted the new credibility information, but because it did not affect his own assessment of credibility, he was not satisfied that it would have affected the Board's. He denied the appeal of these allegations, and upheld the Board's order to resign within 14 days or be dismissed.

In *Elbatton v Canada (Attorney General)*, 2013 FC 71, the Federal Court of Canada granted the Member's application for judicial review. It found that the Acting Commissioner erred in concluding that the new evidence did not change his assessment of credibility, as he was not in a position to make findings of credibility. Further, it was unreasonable and unsubstantiated speculation to hold that the ex-wife's credibility would be unaffected by the new evidence. The Court set aside the decision, and remitted the matter to the Commissioner for reconsideration.

The Commissioner reconsidered the sanction for the two allegations that had not been appealed.

He disagreed with the ERC's recommendation, and demoted the Member to the rank of Constable.

The Member sought judicial review of this decision. In *Elbatton v Canada (Attorney General)*, 2014 FC 67, the Federal Court of Canada dismissed the Member's application, finding that the Commissioner's decision was supported by thorough reasons.

MacLeod v Canada (Attorney General)

In **D-121**, while off duty, the Member and his friend met the Complainant at a party at a private residence where they consumed alcohol. At the end of the party, the three engaged in sexual activity in a bedroom at the residence. In the following days, the Complainant felt unsure if she had consented to the sexual activities. She researched date rape drugs on the Internet, formed the view that she had been drugged, and eventually told the police that she had been sexually assaulted. The Member was alleged to have engaged in disgraceful conduct by committing a sexual assault.

At the disciplinary hearing, a forensic toxicologist testified that the Complainant's drug tests were inconclusive, that there was no evidence of drugs in her system, and that some of the Complainant's symptoms were not consistent with the ingestion of a hallucinogenic-type drug. The Complainant testified that although she actively participated in the sexual activity, and anyone witnessing it would have thought it was consensual, she did not consent.

The Board found the Complainant credible. In its view, there was no satisfactory explanation other than she had been drugged. It also found that the Member knew she had been drugged and was unable to consent. The Board concluded that the allegation had been established, and directed the Member to resign within 14 days or be dismissed. The Member appealed both the finding that the allegation had been established, and the sanction imposed.

The ERC found that the Board made a number of manifest and determinative errors. To begin, the Board erred when it found the Complainant to be credible despite the fact that her testimony contained more numerous, and more significant inconsistencies than the Member's. The Board also erred in finding that the Complainant was unknowingly drugged, as there was no clear and cogent evidence

to support this finding, and it was contrary to the expert evidence. The Board further erred in finding that the Complainant did not consent to sexual activities, given that the Complainant's own testimony, and the surrounding evidence, did not support this. In addition, the Member took reasonable steps to ascertain if she was consenting. The ERC recommended that the Commissioner find that the allegation of disgraceful conduct was not established.

The Commissioner declined to accept the ERC's recommendation, and upheld the Board's decision on the allegation and the sanction.

In *MacLeod v Canada (Attorney General)*, 2013 FC 770, the Federal Court of Canada granted the Member's judicial review application. The Court found that the Commissioner erred in upholding the finding that the Complainant was drugged, as the finding ignored the uncontradicted expert evidence, and there was no clear and cogent evidence to support it. In addition, the Court stated that it was entirely speculative to find that the Member knew the Complainant had been drugged. Finally, the Court deemed it an error to find that the Member did not honestly believe the Complainant had consented. The Court referred the case back to the Commissioner for a redetermination in accordance with its reasons.

The Commissioner subsequently reinstated the Member.

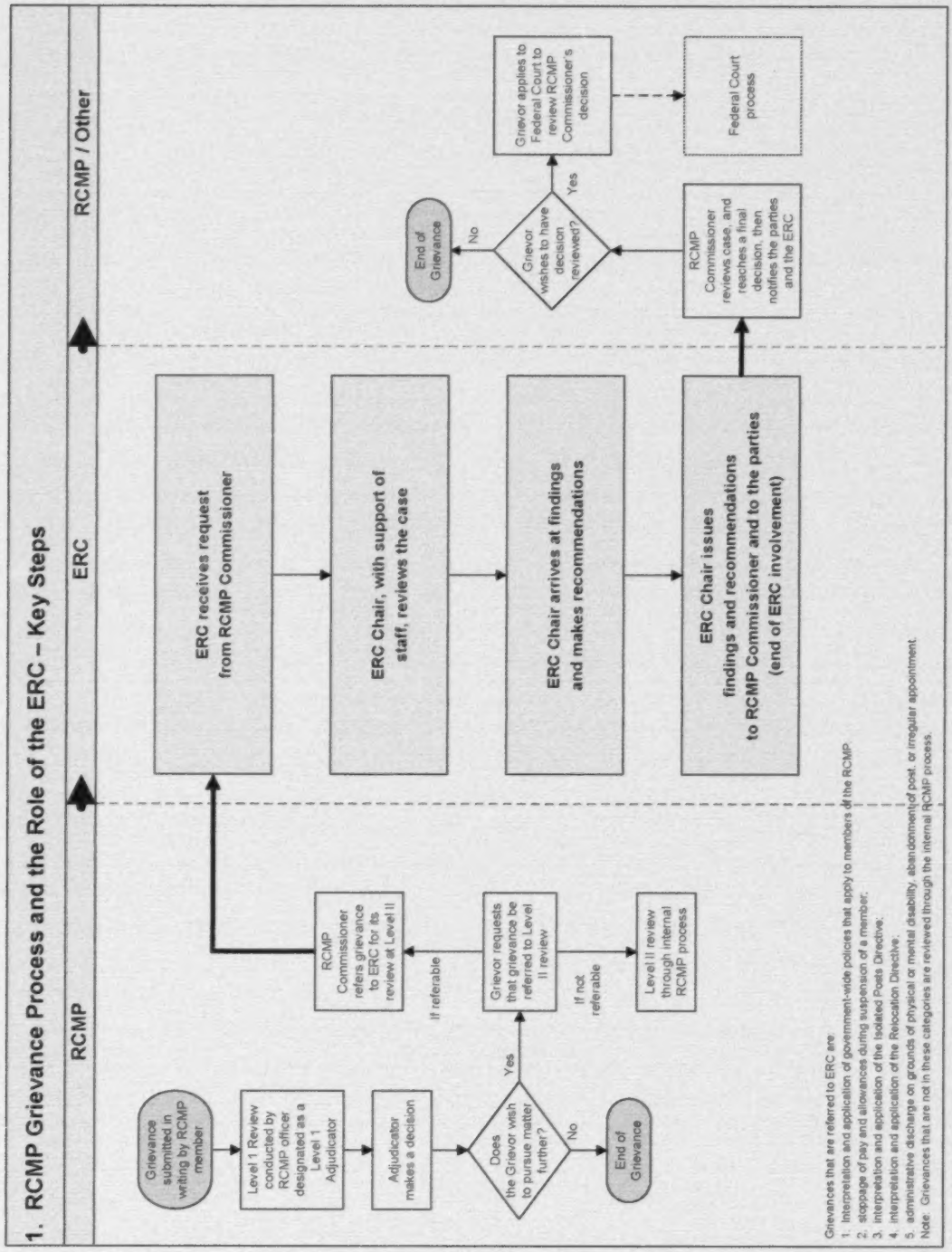
PART V: Appendices

Overview of ERC Recommendations, 2013-14

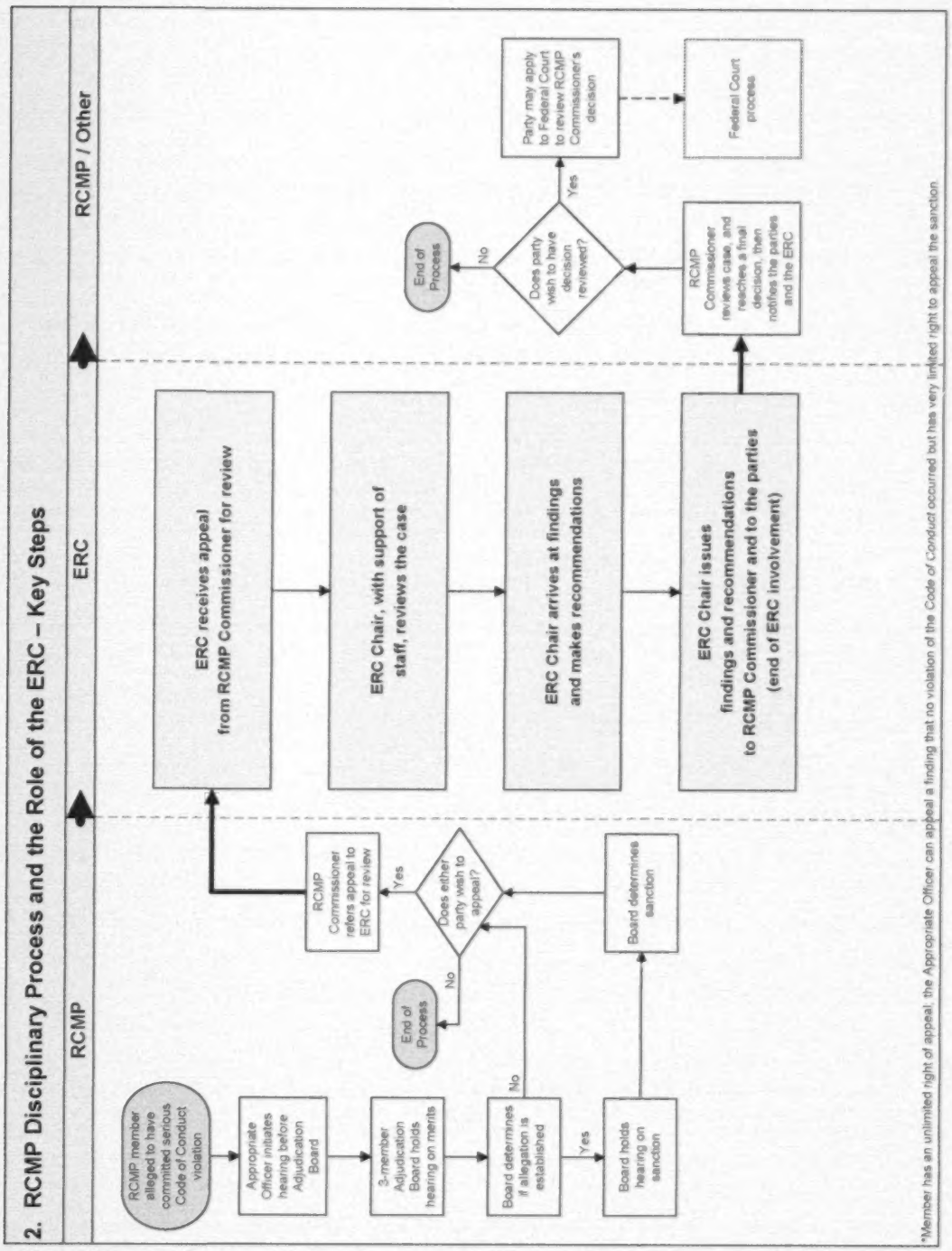
ERC Case Number	Subject Matter	ERC Recommendation
Grievances		
G-552	Harassment. Screening procedure. Harassment complaint process. Apprehension of bias. Definition of abuse of authority.	Allow the grievance.
G-553	Harassment. Screening procedure. Harassment complaint process. Apprehension of bias. Definition of abuse of authority.	Allow the grievance.
G-554	Harassment. Screening procedure. Harassment complaint process. Apprehension of bias. Definition of abuse of authority.	Allow the grievance.
G-555	Leave without pay. Discretionary decision. Fairness.	Allow the grievance. Apologize to the Grievor for the way his LWOP request was processed. Review of the LWOP policy.

ERC Case Number	Subject Matter	ERC Recommendation
G-556	Stoppage of pay and allowances. Admissibility of new evidence at Level II. Expert evidence. Definition of "outrageous conduct".	Allow the grievance. Reinstate the Grievor's pay and allowances retroactively.
G-557	Relocation benefits. Time limits.	Allow the grievance. Return the matter to the Level I Adjudicator.
G-558	Harassment complaint. Harassment test. Definition of abuse of authority.	Deny the grievance.
G-559	Isolated post. Relocation benefits. Time limits and extension.	Deny the grievance.
G-560	Harassment investigation. Time limits. Test for whether extension is warranted.	Allow the grievance. Return the matter to the Level I Adjudicator.
G-561	Vacation Travel Assistance. More than one plausible interpretation. Interpretation of IPGHD in favour of Grievor.	Allow the grievance.
G-562	Promotional Transfer. Relocation Benefits. Time limits and extension.	Deny the grievance.

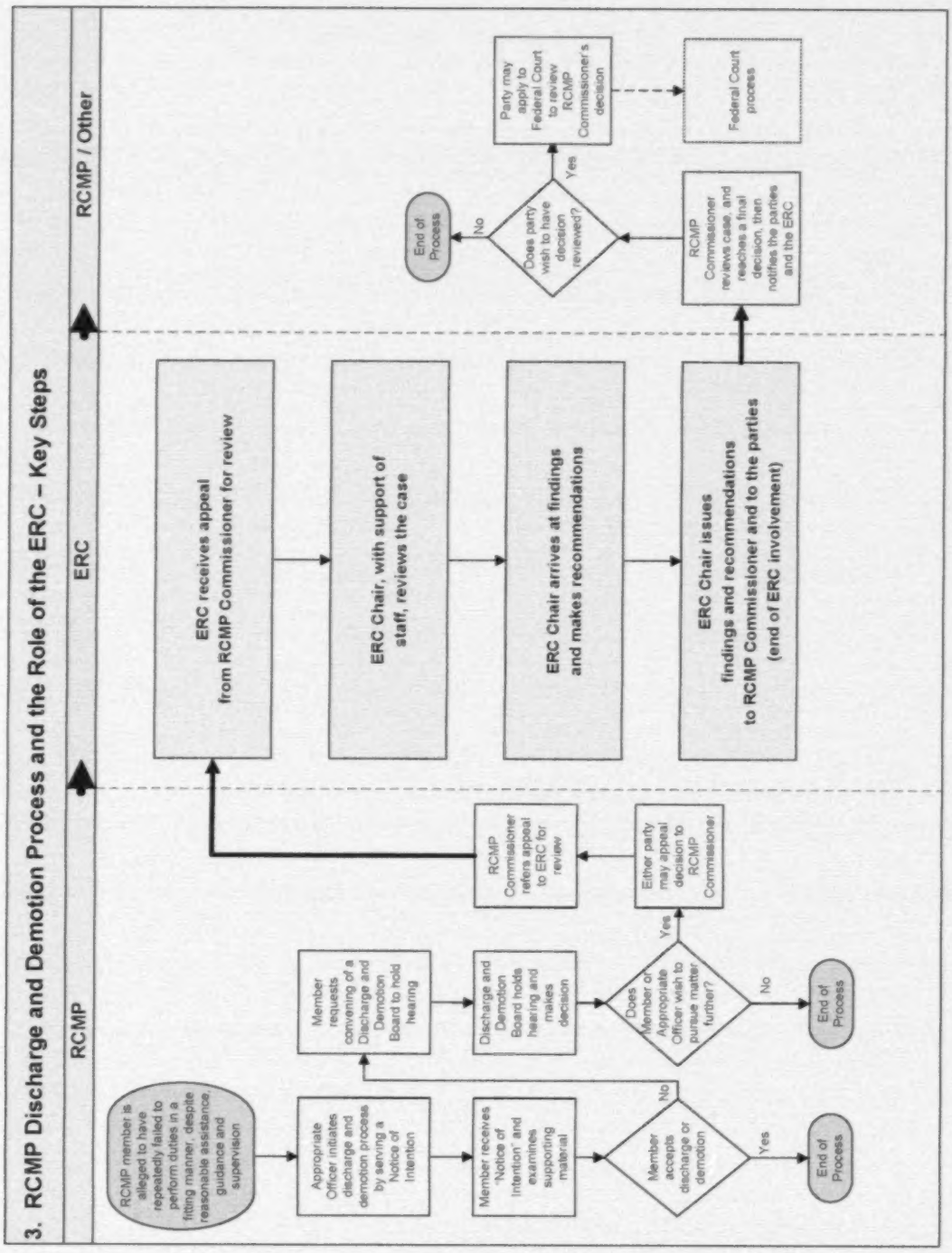
RCMP Process and the Role of the ERC
Grievances


1. RCMP Grievance Process and the Role of the ERC – Key Steps
RCMP
ERC
RCMP / Other
Grievance submitted in writing by RCMP member
Level I Review conducted by RCMP officer designated as a Level I Adjudicator
Adjudicator makes a decision
Does the Grievor wish to pursue matter further?
Yes
No
End of Grievance
Grievor requests that grievance be referred to Level II review
If referable
If not referable
Level II review through internal RCMP process
RCMP Commissioner refers grievance to ERC for its review at Level II
ERC receives request from RCMP Commissioner
ERC Chair, with support of staff, reviews the case
ERC Chair arrives at findings and makes recommendations
ERC Chair issues findings and recommendations to RCMP Commissioner and to the parties (end of ERC involvement)
RCMP Commissioner reviews case, and reaches a final decision, then notifies the parties and the ERC
Grievor wishes to have decision reviewed?
Yes
No
End of Grievance
Grievor applies to Federal Court to review RCMP Commissioner's decision
Federal Court process
Grievances that are referred to ERC are:
1. Interpretation and application of government-wide policies that apply to members of the RCMP;
2. stoppage of pay and allowances during suspension of a member;
3. interpretation and application of the Isolated Posts Directive;
4. interpretation and application of the Relocation Directive;
5. administrative discharge on grounds of physical or mental disability, abandonment of post, or irregular appointment.
Note: Grievances that are not in these categories are reviewed through the internal RCMP process.

RCMP Process and the Role of the ERC
Discipline


2. RCMP Disciplinary Process and the Role of the ERC – Key Steps
RCMP
ERC
RCMP / Other
RCMP member alleged to have committed serious Code of Conduct violation
Appropriate Officer initiates hearing before Adjudication Board
3-member Adjudication Board holds hearing on merits
Board determines if allegation is established
No
Yes
Board holds hearing on sanction
Board determines sanction
Does either party wish to appeal?
No
End of Process
Yes
RCMP Commissioner refers appeal to ERC for review
ERC receives appeal from RCMP Commissioner for review
ERC Chair, with support of staff, reviews the case
ERC Chair arrives at findings and makes recommendations
ERC Chair issues findings and recommendations to RCMP Commissioner and to the parties (end of ERC involvement)
RCMP Commissioner reviews case, and reaches a final decision, then notifies the parties and the ERC
Does party wish to have decision reviewed?
No
End of Process
Yes
Party may apply to Federal Court to review RCMP Commissioner's decision
Federal Court process
*Member has an unlimited right of appeal; the Appropriate Officer can appeal a finding that no violation of the Code of Conduct occurred but has very limited right to appeal the sanction

RCMP Process and the Role of the ERC
Discharge and Demotion


3. RCMP Discharge and Demotion Process and the Role of the ERC – Key Steps
RCMP
ERC
RCMP / Other
RCMP member is alleged to have repeatedly failed to perform duties in a fitting manner, despite reasonable assistance, guidance and supervision
Appropriate Officer initiates discharge and demotion process by serving a Notice of Intention
Member receives 'Notice of Intention' and examines supporting material
Member accepts discharge or demotion
No
Yes
End of Process
Member requests convening of a Discharge and Demotion Board to hold hearing
Discharge and Demotion Board holds hearing and makes decision
Does Member or Appropriate Officer wish to pursue matter further?
No
End of Process
Yes
Either party may appeal decision to RCMP Commissioner
RCMP Commissioner refers appeal to ERC for review
ERC receives appeal from RCMP Commissioner for review
ERC Chair, with support of staff, reviews the case
ERC Chair arrives at findings and makes recommendations
ERC Chair issues findings and recommendations to RCMP Commissioner and to the parties (end of ERC involvement)
RCMP Commissioner reviews case, and reaches a final decision, then notifies the parties and the ERC
Does party wish to have decision reviewed?
No
End of Process
Yes
Party may apply to Federal Court to review RCMP Commissioner's decision
Federal Court process

History of the ERC

The RCMP External Review Committee (ERC) was created in response to recommendations in the 1976 *Commission of Inquiry Relating to Public Complaints, Internal Discipline and Grievance Procedure Within the Royal Canadian Mounted Police*. In 1986, as part of the Commission's call for an independent review mechanism in the area of labour relations within the RCMP, the ERC was formally established through Part II of the *Royal Canadian Mounted Police Act*. It became fully operational by 1988.

People sometimes confuse the ERC and the Commission for Public Complaints Against the RCMP (CPC). The ERC and the CPC were established at the same time in the same legislation to be independent bodies to oversee and review the work of the RCMP. The two organizations are independent from the RCMP and they are distinct from each other. The ERC reviews certain types of grievances and other labour-related appeals from within the RCMP, whereas the CPC examines complaints from the public against members of the RCMP. Both organizations play very important roles, as Justice O'Connor confirmed in the 2006 Arar Commission Policy Review Report, in maintaining public confidence in the RCMP and in ensuring that it respects the law and human rights.

The first Chair of the ERC was the Honourable Mr. Justice René Marin, who from 1974 to 1976 had chaired the *Commission of Inquiry Relating to Public Complaints, Internal Discipline and Grievance Procedure Within the Royal Canadian Mounted Police*. In 1993, the Vice Chair, F. Jennifer Lynch, Q.C., became Acting Chair, a position she held until 1998. Sadly, Ms Lynch passed away in late 2013. Philippe Rabot then assumed the position on an acting basis and, on July 16, 2001, was appointed Chair of the ERC.

Upon Mr. Rabot's departure in April 2005, Catherine Ebbs assumed the role of Acting Chair of the ERC. A member of the Bar of Saskatchewan, Ms. Ebbs was a member of the National Parole Board for sixteen years, the last ten as Vice-Chair in charge of the Appeal Division of the Board. Ms. Ebbs joined the ERC in 2003, serving as Legal Counsel, and then as Executive Director/Senior Counsel, before becoming Acting Chair.

Ms. Ebbs was appointed as full-time Chair on November 1, 2005, for a three-year term. She was

reappointed on November 1, 2008, for a second three-year term. She was then re-appointed successively until July 31, 2013.

A selection process for the position of Chair has been started. In the interim, the Governor-in-Council has appointed David Paradiso, Executive Director and Senior Counsel, as Chair. As of March 31, 2014, Mr. Paradiso remains the Interim Chair.

The ERC produces a wide variety of research publications and reference materials, all of which are available to the RCMP and the general public at www.erc-cee.gc.ca.

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ERC and its Staff in 2013-14 °

David Paradiso, Interim Chair

Catherine Ebbs, Former Chair

Martin Griffin, Acting Executive Director and Senior Counsel

Lorraine Grandmaitre, Manager, Corporate Services

Josh Brull, Counsel

Jill Gunn, Counsel

Caroline Verner, Counsel

Jonathan Haig, Administrative Assistant

° includes secondments and terms